

61888

ORIGINAL

DEPT. OF TRANSPORTATION
DOCKET SECTION

99 AUG 23 AM 11:46

Before the
**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION**

August 19, 1999
WASHINGTON, DC

Comments of
AMERICAN TRUCKING ASSOCIATIONS
On
**QUALIFICATION OF DRIVERS; EXEMPTION
APPLICATIONS; VISION**

FHWA 99-5748-2

FHWA Docket No. 98-5748
Federal Register [Vol. 64, No. 142]



Driving Trucking's Success

The American Trucking Associations (ATA) with headquarters offices at 2200 Mill Road, Alexandria, VA 22314-4677, files these comments in response to the Federal Highway Administration's (FHWA) Notice on its preliminary determination to grant the application of 33 individuals for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations (FMCSRs). According to the notice, granting the exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

ATA opposes FHWA's intent to grant these exemptions.

Statement of Interest

ATA is a federation of trucking and transportation associations in every state. Through 50 affiliated state trucking associations, 14 affiliated national organizations. ATA represents over 35,000 motor carriers and suppliers of every type, including but not limited to, for-hire carriers, truck leasing companies, and truck-equipment manufacturers and other suppliers of goods and services to carriers.

The ATA Safety Policy Department (Department) participates in rulemaking proceedings before federal and state agencies that regulate safety and health issues affecting the trucking industry. In representing the trucking industry, ATA has submitted comments to FHWA on all aspects of the Federal Motor Carrier Safety Regulations (FMCSRs) including proposals for waivers and other issues pertaining to the medical qualifications of drivers. With full-time safety specialists, the Department also offers ATA members a wide range of safety and health services, including educational materials, seminars, and individual consultations and on-site audits.

The ATA Position

ATA continues to oppose any erosion of the medical standards currently set forth in 49 CFR 39.141(b). ATA has been consistent in its opposition to the granting of vision waivers as illustrated in its written comments to FHWA in response to docket nos. MC-96-2, FHWA-97-2825, FHWA-98-3637, and FHWA-98-4334.

ATA firmly opposes FHWA's proposal to grant 33 additional exemptions to its vision standards (49CFR 39.141(b)(10)). Industry experience clearly demonstrates that the current vision requirements have served well in ensuring that the drivers of the nation's trucks have sufficient visual capabilities to be able to safely perform their duties -- a point FHWA clearly agrees with (see 64FR 16517, 16518 (finding that the present vision standard is necessary to "ensure highway safety.")). The efficacy of the current regulations is, in large part, responsible for the very small number of accidents in which the medical condition of the drivers was reported as a causative factor.

Moreover, it is generally acknowledged that 90-95% of a driver's actions are determined primarily by what he/she sees. The driver must be able to monitor changing conditions of the road, weather and traffic. In addition, the continued utilization of Intelligent Transportation System (ITS) technology provide for an ever-increasing array of gauges and other displays being added to the interior of the vehicle. This increases the demand for the driver's attention to visual detail and need for increased, not decreased, visual acuity.

FHWA maintains that the drivers who seek vision exemptions have excellent driving records. However, it is not known whether these drivers drive long distances. The demands of driving long distances can produce eye strain and fatigue in drivers with 20/20 vision, let alone those drivers with monocular vision.

The ability of drivers to pass vision requirements is vital to the trucking industry. ATA members view the need for peripheral vision as crucial in obtaining a commercial drivers license (CDL) to operate a commercial motor vehicle (CMV) in interstate commerce. According to one ATA member, "[T]he peripheral vision factor is of main concern." That concern lies in the fact that the direction of head movement takes away total vision perception. For example, when a driver with monocular vision is checking mirrors, the one eye must focus on that item alone. This creates a loss of total vision awareness of what is happening in two other directions – front and opposite side. We agree with that member's assertions. Other ATA member concerns include possible problems, such as foreign objects in the "good" eye could cause temporary blindness.

The Americans With Disabilities Act

In three related decisions issued on June 22, 1999, the U.S. Supreme Court concluded that a determination of disability under the Americans with Disabilities Act (ADA) must take into consideration corrective measures that reduce or eliminate the limitations caused by the impairment. These rulings have substantial significance regarding the relationship between the ADA and FHWA's medical qualifications. In particular, the court noted motor carriers' "unconditional obligation" to follow federal standards and held that a motor carrier was not required to make any sort of individualized determination beyond the fact that the individual does not meet the federal physical requirement. *Sutton v. United Airlines*, No.97-1943 (U.S. Sup. Ct., June 22, 1999); *Murphy v. United Parcel Service*, No. 97 1992, (U.S. Sup. Ct., June 22,1999); *Albertsons, Inc. v Kirkingburg*, No. 98-591 (U.S. Sup. Ct., June 22, 1999) ("The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations.")

Moreover, the Supreme Court's decision in *Albertsons* calls directly into question the appropriateness of FHWA continuing a vision waiver program, or at least a program that implicitly mandates motor carrier participation. The Court noted that "the waiver regulation [as originally promulgated] did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general

acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way.” *Albertsons, Inc.*, Slip op. at 20 (emphasis added). Based on that conclusion, the Court held that Albertsons was entitled to demand driver compliance with the general acuity standards and could not be forced to participate in the “experimental” vision waiver program. Although the current waiver regulation was not at issue in the case and not considered by the Court (see Slip op. 21, n.21), the Court’s conclusion applies equally to the current vision exemptions.

The current vision waiver program was promulgated under a standard that allows granting an exemption if FHWA finds that “such exemption would likely achieve a level of safety that is equivalent to, or greater than the level that would be achieved absent such exemption.” 49 U.S.C. §§ 31315, 31136(e). In this proceeding, and in general, FHWA makes that finding relative to waivers of the vision standards based on the applicant’s past driving record. 60 FR at 40408 (“past driving performance is a reliable indicator of an individual’s future safety record.”). This conclusion is based on the belief that such drivers have “adapted their driving skills to accommodate their vision deficiency.” *Id.*

Yet in earlier analysis of the vision waiver program, FHWA has recognized that the general vision standards must reflect “performance-based visual standards” and that “[t]he agency’s ultimate goal is to adopt driver physical qualification standards that are performance-based; that is they will reflect the actual physical requirements that foster safe operation of commercial vehicles.” Department of Transportation, *Qualification of Drivers; Vision Deficiencies; Waivers*, 59 FR 59386, 59389-90 (Nov. 17, 1994) (emphasis added). And based on that view, FHWA recently concluded that “the present [vision] standard is reasonable and necessary as a general standard to ensure highway safety.” Department of Transportation, *Qualification of Drivers; Exemption Applications, Vision*, 64 FR 16517, 16518 (April 5, 1999).

The vision waiver program is thus based on a safety standard that relates to a driver’s experience and record, while the general vision requirements are based on “performance-based visual standards” that are designed to ensure that a driver has the actual visual capabilities needed for the safe operation of a commercial vehicle. The vision waivers and general vision requirements are thus based on completely separate standards, making it impossible for the FHWA to factually conclude that the current vision waiver program will be conducive to public safety, “in the manner” of the general acuity standards – the U.S. Supreme Court’s mandate in *Albertsons*. Put simply, the general vision standards protect the public by ensuring that drivers have the visual capacity to safely do their job, while the vision waivers ignore driver visual capabilities and presume safe driving ability based on past performance.

Since the relative safety of the vision waivers and general vision requirements are adjudged on different standards, FHWA has no basis for concluding that the two regulatory requirements protect the public in the same manner. Consequently, the current vision waiver program cannot, under the Supreme Court’s analysis in *Albertsons*, be viewed as any more binding on motor carriers as the original waiver program. FHWA should expressly recognize that fact in its final ruling in this matter and if it wishes to

continue to permit experience-based vision waivers it should make clear that acceptance of such waivers is voluntary on the part of a motor carrier.

Moreover, instead of the minimal guidance FHWA has given in the past (see 64 FR 16517, 16520 (noting that motor carriers must be prepared to defend their application of higher physical qualification standards if challenged under the ADA), the agency should expressly note that motor carriers are legally entitled to require driver applicants to satisfy the general federal vision qualification standards and that drivers that are eligible to drive interstate only because of a vision waiver are not considered to have met the underlying general vision qualification requirement by virtue of the waiver.

Conclusions and Recommendation

- The trucking industry continues to oppose the granting of waivers and exemptions to drivers who cannot meet existing medical standards.
- If FHWA chooses to exempt drivers from the vision requirements, ATA strongly recommends that such drivers be subjected to annual medical examinations and annual vision checks by an optometrist or ophthalmologist.
- Drivers who are granted vision waivers and/or exemptions should be required to report involvement in any DOT-recordable accident directly to FHWA and should be required to undergo a medical examination and required evaluation of his or her vision before being authorized to continue driving a CMV.
- FHWA should clarify its predominance over the Americans with Disabilities Act, as it applies to safety-sensitive jobs and tasks by: (1) issuing a notice in federal register summarizing the aforementioned Supreme Court case, as it applies to FHWA's vision waiver/exemption program; and (2) amending 49 CFR 391.64, to clarify that an employer still retains the right to consider a driver who fails FHWA's vision requirements, as medically unqualified to operate a CMV in interstate commerce.

ATA appreciates the opportunity to comment on this notice and proposed issuing of 33 vision exemptions. If there are further questions about the trucking industry's position on this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Stuart Flatow".

Stuart Flatow, Director
Occupational Safety and Health